

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION

In the matter of the Transportation)
Appeal of)
EDWARD E. AHLQUIST, et al.,)
Appellants,)
v.)
SCHOOL DISTRICT NO. 2; VIRGIL POORE,)
Superintendent of School District No. 2;)
THE SCHOOL BOARD OF SCHOOL DISTRICT)
NO. 2; MAURICE COLBERG, JR., Chairman)
of the School Board,)
Respondents.)

DECISION AND ORDER

OSPI 12-81

This is an appeal from a Decision and Order of the Yellowstone County Transportation Committee which affirmed the School District No. 2, Yellowstone, Montana; decision not to provide bus transportation for Appellants' children. The Yellowstone County Transportation Committee based its decision on "school law and the discretionary powers of the district to establish school bus routes within a 3-mile limit and to determine the eligibility of riders according to school policy."

Appellants are residents of Yellowstone County, Montana, and live within the exterior boundaries of School District No. 2 of Billings, Montana. Each of the Appellants is a parent and natural guardian of one or more children of school age who attend Arrowhead Elementary School, operated by and within said school district.

Appellants' children have been provided with bus transportation by School District No. 2, to and from Arrowhead School. The transportation service was provided at the beginning of the school year and the parents paid in advance for bus transportation for the first semester.

Appellants live on or near Rimrock Road, which is a state highway, located west of Billings. Several Appellants live on the south side of Rimrock Road while the remainder of the Appellants live on the north side of Rimrock Road.

On September 9, 1981, Appellants were notified by the school district that bus service would no longer be provided to their children beginning September 14, 1981. Appellants learned that busing was

being discontinued because they did not live in excess of one mile from Arrowhead School as required by the school district busing policy.

The school district busing policy allows busing for children: who do live in excess of one mile from Arrowhead School or if a safety hazard is present. Appellants requested that the school district evaluate and review the safety situation in the area. The school board designated a group of individuals to act as a safety committee for the school district. The safety committee completed a comprehensive study and returned the report to the Board of Trustees on September 17, 1981.

On September 22, 1981, Appellants attended a meeting of the Education Committee of the Board of Trustees to request reconsideration of the busing denial based on the safety issue. The school district's committee rejected such reconsideration.

Appellants appealed the Decision to the Yellowstone County Transportation Committee which held a hearing on the matter. Appellants claimed that the school district's decision to terminate busing should be set aside based on two reasons:

1. That busing transportation should be provided for the children that live on the south side of Rimrock Road because of a safety hazard.
2. That the remaining Appellants were entitled to bus service because their children, who lived on the north side of Rimrock Road, would be required to walk in excess of one mile to school, even though Appellants' houses were located less than one mile from school, and the board's decision thereby allegedly violated its own policy concerning busing and violated state law.

The Yellowstone County Transportation Committee conducted a hearing. At the conclusion of the hearing, the transportation committee rendered a decision and order in favor of the school district. It is from that decision that Appellants present this case.

This State Superintendent has adapted the standard of review as set forth in Section 2-4-704 MCA (Montana Administrative Procedures Act). The standards of review states:

(1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (g) because findings of fact, upon issues essential to the decision, were not made although requested. See also Yanzick v. School District No. 23, ___ Mont. ___, ___ 39 St. Rptr. 191 (1982).

Appellants' argument rests upon the Board's alleged "arbitrary or capricious action or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Montana law provides that school districts are responsible for bus transportation to certain public school children. Section 20-10-100 et seq. MCA, (1981). Trustees may furnish transportation for "eligible transportees." If the trustees choose to furnish transportation to one "eligible transportee," they must furnish it to all "eligible transportees." An eligible transportee is defined as a public school pupil who "resides at least three miles, over the shortest practical route, from the nearest operating public school." Section 20-10-101(2), MCA.

Appellants reside within three miles of Arrowhead School. They do not qualify as "eligible transportees." Since they are not eligible transportees, then the school district may maintain a policy in determining which ineligible transportees have access to bus transportation.

The school board adopted a policy on school transportation. The policy states in part:

- c. Transportation service is organized to provide: (a) that students in Grades K-6 may ride a school bus if living one or more miles from the school attended, or if a safety hazard is present as determined by the board or its designee...

The school trustees have the discretionary power to decide whether or not to provide transportation. The school district's compliance with the statute is not contested. The contested issue is those children who are ineligible and who, within the discretion of the school board, may be afforded transportation. The Legislature did not restrict the trustees discretionary powers in providing or refusing to provide transportation. This discretionary power must be exercised reasonably, and not abused by arbitrary or capricious action. State ex rel. School District No. 29, Flathead County v. Cooney, 102 Mont. 521, 59 P.2d 48 (1939), Young v. Board of Trustees, 90 Mont. 576, 4 P.2d, 725 (1931).

Measuring Distances

Appellants claim that those children living north of Rimrock Road should be bused to Arrowhead Elementary School because they must walk more than one mile to reach the school.

Appellants claim that the trustees abused their discretion in the way they applied the policy to Appellants' children and the County Transportation Committee failed to reverse the decision. The question then becomes how are distances for transportation purposes measured under Montana law. The question of how to measure the one mile distance is raised by the fact that the children living north of Rimrock Road reside:

- (a) less than one mile from Arrowhead School when that distance is measured along 38th Street and Rimrock Road, the normal driving route; but,
- (b) More than one mile from Arrowhead School when that distance is measured by following the safe walking route designated by the trustees for these children.

Montana law is clear on the determination of mileage distances. The application of the law in this case resolves the first issue.

Section 20-10-106, MCA, determination of mileage distances states:

When the mileage distance that transportation services are to be provided is a matter of controversy and is an issue before a board of trustees, a county transportation committee, or the superintendent of public instruction, the mileage shall be established on the following basis:

- (1) The distance in mileage shall be measured by a vehicle equipped with an accurate odometer.
- (2) A representative of the applicable district and a parent or guardian of the child to be transported shall be present when the distance is measured.
- (3) The measurement shall begin 6 yards from the family home and end 6 yards from the entrance of the school grounds closest to the route.
- (4) The route traversed for the measurement shall be the route designated by the trustees, except that the route shall be reasonably passable during the entire school fiscal year by the vehicle that provides the child's transportation. In determining reasonable passage, a route may not be disqualified because it is impassable during temporary, extreme weather conditions such as rains, snow, or floods. (emphasis supplied)

Respondents contend that this measurement statute does not apply to the present case. I disagree. The question is one of distance as it applied to the policy. The statute requires that the route measured be the route "designated by the trustees." The Montana statutes do not specifically refer to walking distances. The statute speaks of residence distances, which, in the absence of a measurement statute could even be measured "as the crow flies." The measurement statute must be read in the context of the other transportation statutes. It specifically requires the measurement be made with a vehicle. It specifically requires that the measured route be "reasonably passable" for a vehicle. The "shortest practical route" is therefore clearly intended to be a vehicular route. In terms of measurement, the statute restricts the discretionary power of the trustees to determine distances. Transportation cases are not walking distances nor are they required to be so.

Safety Hazard

The second issue on appeal is whether the County Transportation Committee erred in not finding that the school district acted in an arbitrary and capricious manner in applying its safety hazard exception to this transportation case. The Billings school district is one of the largest school districts in the state. Geographically, and in terms of population, the questions of safety for all children are of considerable magnitude and must always be considered by the Billings

school district. The record indicates that the district has been requested by numerous individuals to provide bus transportation for their children on the basis of a safety hazard. The school district responded to these numerous requests by establishing a safety committee which reviews such requests and recommends a response to the trustees. The safety committee, made up of numerous individuals, investigates all requests for transportation based on safety hazards throughout the district.

From the record it appears that the safety committee is familiar with the variety of walking conditions faced by school children throughout the school district and has developed expertise and experience in comparing claimed hazards in one area with claimed hazards elsewhere in order to achieve a uniform application of the policy throughout the district. The school board of trustees is responsible for the health and safety of the children in their school district. They are permitted to employ and dismiss administrative staff and other personnel deemed necessary to carry out the various services of the district. Section 20-3-324, MCA. The trustees may choose to accept or reject the safety committee's recommendation. Here they chose to accept the recommendation.

The record is replete with testimony indicating that the safety committee carefully considered the claims made by the Appellants. For Appellants' children living north of Rimrock Road, the safety committee investigated and developed a safe walking route in the fall of 1980. For Appellants' children living south of Rimrock Road, the investigation was completed upon Appellants' request. The evidence presented at the county transportation committee hearing shows that in making its determination, the safety committee considered factors including: traffic density, geography, weather, conditions of roads, existence of shoulders on roads, and the existence of alternate walking routes, walking parts of it themselves, and driving along other parts. From the record, the safety committee compared the level of danger posed by the proposed safe walking paths to the level of danger found along other safe walking routes within the district, where bus transportation has previously been denied. The members of the safety committee judged that any hazard present was insufficient to justify bus transportation.

The safety committee recommended their findings to the board of trustees; a board composed of eight members selected from the community and by the community to govern the affairs of the district. Appellants were granted a hearing before the trustees. Appellants had the full opportunity to and did present facts of claimed safety hazards to the trustees. The report of the safety committee was also presented.

Once again the evidence was presented upon appeal by the Appellants to the County Transportation Committee. The County Transportation Committee was made up of the following individuals: Jim Straw, representing the Board of County Commissioners; Rita Reiser, representing School District No. 2; Bill Sorg, representing Laurel High School and Elementary District; Bud Vise, representing Broadview's High School and Elementary District; Jack Welch, representing Pioneer-Shepherd Elementary and High School District; Dennis Espeland, representing the elementary districts under the Billings High School District for School District No. 2, and the County Superintendent of Schools, Genevieve Bauer. A total of nine local individuals present in the Billings area. The County Transportation Committee had an opportunity to review all of the evidence presented to them. Appellants were represented by counsel and had an opportunity to present evidence and cross-examine witnesses at the hearing. This particular hearing afforded due process for all concerned and has been recognized by the Montana Supreme Court in Yanzick v. School Board to be the record upon which all appellate review shall occur. The Committee exercised its statutorily granted discretion and made a careful and considered decision that there was insufficient safety hazard to justify the provision of bus transportation.

An appeal of this nature involved approximately 20 people from the local school district area who had an opportunity to review the evidence and review the material presented to them by both parties. A safety committee was established to carefully evaluate the alleged safety hazard. The school board made up of local individuals of the community had an opportunity to make an independent evaluation after public hearing. Further, the County Transportation Committee had an opportunity to review once again and conduct a de novo hearing on the entire case. After hearing all of the evidence, including the facts

on the alleged safety hazard itself, the County Transportation Committee found no abuse of discretion. Appellants now request that an individual located 250 miles away from the local school district make a separate and independent evaluation of the evidence where approximately 20 individuals who were intensely involved in this case spent many hours taking in evidence and considering all facets of this case. The Montana Administrative Procedures Act and the Montana Supreme Court in the Yanzick decision clearly prohibit this state superintendent or any other court of review to substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. This state superintendent may affirm the decision or remand the case for further proceedings. I may not substitute my judgment for that of nearly 20 other people. Section 2-4-704, MCA.

Appellants in this case presented no competent evidence to support the finding to any committee that a safety hazard existed. Specifically, no traffic counts were given. No accident reports were analyzed. There was no comparison with other districts by the Appellants of potential problems. The school district did present an exhibit dealing with the matrix to be used in analyzing safety hazards for school children. It was not until Appellants presented their argument to the state superintendent that additional evidence was attempted to be introduced. None of the exhibits were offered into evidence at the Board's hearing or before the County Transportation Committee. None of the exhibits were allowed to be cross-examined or explained in detail. The Supreme Court in Yanzick disallows such additional evidence, especially evidence that may be questionable as to the relevancy, competency or potential hearsay. This additional evidence will not be accepted here.

I find, therefore, that the County Transportation Committee did not abuse its discretion in affirming the board of trustee's decision in denying transportation to Appellants in this case. The real issue, however, goes far beyond the scope of this administrative appeal or the power of this state superintendent. The solution that was requested by the Appellants is only one which in a short term, temporary fashion alleviates or minimizes the safety concern of parents for the entire district. The school district is not in the business of insuring safety of highways. They are in the business of educating child-

ren. The State Highway Department and the City of Billings are the authorities responsible to construct adequate bike paths, pedestrian paths, and take all reasonable and appropriate steps to insure safety not only for the children of Billings, but for all citizens of Billings. Since no evidence was presented at the hearing as to efforts that these entities are taking, I am bringing this matter to the attention of the appropriate officials who have first-hand knowledge, as do the other twenty members of this appeal process, of the problem. I am strongly recommending that this local problem be resolved in Billings by the people that are hired and assigned to take care of these problems. I shall work as an advocate on behalf of safety to insure that if a safety hazard exists in any part of Billings, a long-term permanent solution is found, rather than a short term busing solution.

Within a few weeks, the school district will let children out on spring days or during the summer. The children are still walking down this barrow pit which is alleged to be a safety hazard. They are still allegedly hidden from view and the possibility of an accident is still there. A temporary solution will not solve the problem. As a parent myself, I know that parents are ultimately responsible for the safety of their children and therefore are urged not to single out the school, but to find, through the appropriate planning staff of the highway department, a solution to this problem. I call the attention of Mr. Don Harriott, Chief Engineer of the Montana Highway Department, and Mr. Al Thelen, the Billings City Manager, to this problem. The city traffic engineer, Pierre Jomini, must also be an integral part of the solution to any safety hazard present here. I urge that the school district and the City of Billings commit themselves to a long-term solution to any alleged safety hazard which affects school children in that city. Insufficient evidence was presented in the County Transportation Committee level that would order a temporary busing solution. To allow the children the use of transportation would not provide the protection which is called for in this case. However, I am also concerned as to the safety of children in all areas of Arrowhead School and the school district as a whole. It is for those children whose parents are not as concerned about safety as Appellants in this case that I address my concern as well. In the long run, the

safety of the children involves 12 months of the year. That must be the goal established here.

I am making this office available as an ombudsman, or an advocate on behalf of the safety of all children in this area. I am prepared to assign our transportation specialists to work on this problem and to keep me updated as to the progress in this area. Much valuable time is being lost in the effort to correct the safety problems through further litigation over busing. The time and concern of both the parents and the local city engineers and the state highway department must be devoted to those who can construct the final, permanent solution. I affirm the County Transportation Committee's decision and request that all parties in this action take appropriate measure to insure the safety of their children and the entire school district of Billings.

DATED April, 1982.